Decca Limited Partnership d/b/a Manor Care of Decatur *and* United Food and Commercial Workers, Local Union 1996. Cases 10–CA–28546, 10–CA–28558, 10–CA–28601, 10–CA–28805, and 10–CA–28920

March 24, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On March 6, 1998, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.

1. We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by including in employee Ida Minter's evaluation a negative comment about her wearing of large buttons, which were union buttons.[3] The judge's conclusion of law characterized the overall rating of the job evaluation as "poor." However, the undisputed facts are that the Respondent included the unfavorable comment in an evaluation with an overall rating of "good." We shall modify the conclusion of law to reflect the facts more accurately. The judge inadvertently omitted reference to this violation in the recommended Order and notice. We shall modify the recommended Order and notice accordingly.

However, we do not agree with the judge that by the same action the Respondent also created the impression of surveillance in violation of Section 8(a)(1).

Minter was hired on November 27, 1993. She actively supported the Union and frequently wore union hats and numerous union buttons on her work uniform. Minter did not receive her first evaluation until February 15, 1995. While the overall rating was good, her supervisor, Carolyn Aaron, wrote in the "Guest Relations Performance Standard" section, "Minter needs to review the dress code, wears large buttons on her tops, socks instead of stockings and short pants." Aaron admitted that the comment referred to Minter's wearing of union buttons.

The Board's test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. *Schrementi Bros., Inc.,* 179 NLRB 853 (1969). Here, it is undisputed that Minter was an active and open supporter of the Union who frequently wore union insignia while working. Because Minter's wearing of union buttons was public and a matter of common knowledge, she could not reasonably assume from her supervisor's comment that her union activities were under surveillance. Accordingly, we find that the Respondent did not create the impression of surveillance by commenting in Ida Minter's evaluation on her wearing of union buttons.

2. We agree with the judge that the Respondent's termination of employee Rose Harvey for abandoning her job was lawful. Pursuant to the Respondent's employee handbook, Harvey was not eligible for a leave of absence (when she sought leave to attend a funeral) because she had not been employed for a year at the time she took leave. None of the Respondent's managers gave her permission to take a leave of absence. In fact, Assistant Director of Nursing Linda DeSue told Harvey that the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge at sec. I,B,3 of his decision that the allegations of par. 10 of the complaint have been established. We shall modify his conclusion of law, recommended Order, and notice to conform to the complaint and his findings of fact.

[2] Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Sec. 8(a)(1) by photographing employees handbilling outside its facility. As set forth in *F. W. Woolworth Co.,* 310 NLRB 1197 (1993), on which the judge properly relied, "the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." Here, the judge found, and our dissenting colleague does not dispute, that "the Respondent did not present any credible evidence to establish the necessity for its taking pictures of its employees while they were engaged in protected concerted activity." In *F. W. Woolworth,* supra, the Board also stated that it disagreed with *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982), denying enf. to 255 NLRB 1338 (1981), cited by our dissenting colleague, and that it continued to adhere to the Board's *United States Steel* decision. Significantly, in three cases decided after *Woolworth* with approval and followed its sound principles. *Clock Electric v. NLRB,* 162 F.3d 907 (6th Cir. 1998); *California Acrylic Industries v. NLRB,* 150 F.3d 1095 (9th Cir. 1998).

Contrary to his colleagues and the judge, Member Brame would not find that the Respondent violated Sec. 8(a)(1) of the Act by photographing employees engaged in handbilling at the Respondent's facility. The handbilling was conducted in the open, and the photographing was unaccompanied by threats or other conduct that would suggest coercion. Member Brame believes that whether employer photographing violates the Act depends, as with other alleged 8(a)(1) conduct, on whether, under the particular circumstances, the conduct would reasonably tend to "interfere with, restrain, or coerce employees" in the exerciser of protected rights. See *United States Steel Corp. v. NLRB,* 682 F.2d 98, 101–104 (3d Cir. 1982). Given the open and public character of the handbilling, as well as the absence of other factors objectively indicating coercion, Member Brame is unable to conclude that the employer's photography violated the Act.

[3] It is unnecessary to pass on the issue whether the Respondent's conduct also violated Sec. 8(a)(3). The finding of such an additional violation would not affect the Order.

Respondent could not guarantee her a job on her return. Because Harvey's leave of absence was not authorized, the Respondent properly terminated her for job abandonment under the "critical offense" policy in the employee handbook.

We do not agree with our dissenting colleague that Harvey was disparately treated as compared to employee Sharon Edwards. Neither employee was entitled to take a leave of absence. Neither employee was returned to the position they left when they came back from their unauthorized leaves. We agree with the judge that this evidences a uniform application of the leave policy.

Our dissenting colleague asserts that Harvey was treated differently than employee Edwards. The asserted difference is that Harvey was formally discharged, and Edwards was not. However, the distinction is without a substantive difference. Neither was allowed to return to her position after taking an unauthorized leave of absence. In Harvey's case, she was formally discharged and then not permitted to return.[4] In Edwards' case, she was simply not permitted to return. However, as noted, the ultimate result was the same—neither was allowed to return. In practical effect, both were terminated.

Our colleague's emphasis on the fact that the Respondent formally terminated Harvey also fails to take into account all of the circumstances. Neither employee was guaranteed a job on her return from unauthorized leave. Edwards, when she returned from her unauthorized leave requested a different job, i.e., to be called on an as needed basis. Harvey, on the other hand, made no such request. That the Respondent agreed to Edwards' request, but did not offer the same opportunity to Harvey, who made no such request, does not, in our view, constitute disparate treatment.[5]

Finally, there have been other employees who were terminated for abandoning their jobs. Our colleague asserts that Harvey was unlike these other employees. That is, according to the dissent, she announced in advance her desire to take leave, consulted with two managers about the request, did what they said, and sought to return to work. Of course, this omits the fact that no one granted her request to take a leave of absence, inasmuch as such leave would be contrary to the employee handbook. Indeed, for that reason, the assistant director told her that the Respondent could not guarantee her a job upon her return.[6]

Thus, assuming arguendo, without deciding, the General Counsel met its initial burden to show Harvey's union activity was a motivating factor in her discharge, the Respondent established that it would have taken the same action notwithstanding her protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the present Conclusion of Law 3:

"3. The Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by creating the impression among its employees that their union activities and sympathies had been discussed in management meetings and that they would not be called in to work because of their union activities, by instructing employees not to show their job evaluations to other employees or to discuss their wages with other employees, and by threatening employees that the Respondent only had one or two employees to get rid of and the Respondent would win the union election."

2. Substitute the following for the present Conclusion of Law 4.

"4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by suspending and discharging its employee Herbert Green and by commenting unfavorably in the "Guest Relations Performance Standard" section in Ida Minter's job evaluation because she wore Union buttons."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Decca Limited Partnership d/b/a Manor Care of Decatur, Decatur, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a):

"(a) Creating the impression among its employees that their union activities and sympathies had been discussed in management meetings and that they would not be called in to work because of their union activities."

2. Insert the following as new paragraph 1(f) and reletter the present paragraph 1(f) as 1(g).

[4] Our dissenting colleague ignores the fact that Edwards was no longer a full-time employee following her leave of absence. Edwards then worked only as an on-call employee, and there is no showing that Harvey ever sought this status on her termination as a full-time employee.

[5] "An essential ingredient of a disparate treatment finding is that other employees *in similar circumstances* were treated more leniently than the alleged discriminatee was treated." *Thorgren Tool & Molding,* 312 NLRB 628 fn. 4 (1993) (Emphasis added). Here, as explained above, the circumstances of the two employees are not "similar" because Edwards requested PRN status, while Harvey did not.

Our dissenting colleague also appears to rely on Harvey's testimony that upon her return from her unauthorized leave, the Respondent refused to consider her for a certified nursing assistant that was advertised in a newspaper. The judge, however, credited Director of Nursing Jill Conley's testimony that employees who took unauthorized leaves of absence and abandoned their jobs were not eligible for full-time reemployment. The Respondent's treatment of Harvey was consistent with this policy. Further, the Respondent's treatment of Edwards was likewise consistent with this policy because Edwards only sought "on call" status, not a full-time job.

[6] Contrary to our dissenting colleague, we find that Harvey did effectively abandon her job by taking a leave of absence for which she had no approval.

"(f) Commenting unfavorably in employee job evaluations because employees wear Union buttons."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, dissenting in part.

I dissent from my colleagues' adoption of the administrative law judge's finding that employee Rose Harvey was lawfully discharged. Contrary to the judge and my colleagues, I would find that she was disparately treated by the Respondent because of her union activity and discharged in violation of Section 8(a)(3) and (1) of the Act.[1]

There is no dispute that Rose Harvey was an active union supporter and that the Respondent was aware of her union activity. It is also clear that the Respondent exhibited strong antiunion animus, as demonstrated by its unlawful discharge of the leading organizer, Herbert Green, and it's other unfair practices in violation of Section 8(a)(1).

On Friday, November 10, 1995,[2] Harvey informed Director of Nursing Jill Conley that Harvey's grandmother in New York had died and that she needed time off to attend the funeral. Conley said to let her know how much time Harvey needed as soon as the arrangements were final.

On Saturday, November 11, Harvey received an urgent call from relatives requesting that she come to New York as soon as possible. Conley was not at work, so Harvey contacted Assistant Director of Nursing Linda DeSue. Harvey stated that her grandmother had died and that she needed to go to New York. Harvey said that she had spoken to Conley the day before about a leave of absence.

DeSue replied that, because the office was closed, she would not be able to process the paperwork for a leave of absence; that Harvey should write a letter requesting time off and put it in her office; and that her job was not guaranteed upon her return from leave. Harvey prepared a request for leave from November 12 through 21 and placed it under the office door.

On November 14, Conley and DeSue reviewed Harvey's request for a leave of absence and determined that because she had been employed for less than 1 year,[3] she was not eligible to take a leave of absence. Additionally, they noted that she was scheduled to work November 11 and 12 and that the handbook provides for 1 day of paid leave for an employee scheduled to work on the day of the funeral of a grandparent. Thus, according to Conley and DeSue, because Harvey was not entitled to take a leave of absence and was entitled to only 1 day of paid leave, her failure to return to work on November 12 warranted discharging her based on job abandonment.

On November 21, Harvey called Conley. Harvey stated that she needed another day to finish with her grandmother's estate. Conley advised Harvey that they needed to meet when Harvey returned to work.

When Harvey returned home the next day, she found a letter of termination for unauthorized leave of absence. Harvey called Conley and was advised that Conley could not hold Harvey's certified nursing assistant position and that the job had been filled.

The Sunday after her discharge, Harvey saw an advertisement in the newspaper stating that the Respondent needed certified nursing assistants to work both day and evening shifts. Harvey called and asked Human Resources Manager Margaret Williams why the Respondent had placed the ad, yet told Harvey that her job had been filled. Williams responded that she was busy and did not have time to talk to Harvey.

The judge found that the Respondent would have terminated Harvey even in the absence of her union activity. In reaching this conclusion, the judge relied on the following findings: (a) Harvey was not treated differently than employee Sharon Edwards and (b) the Respondent followed its leave of absence policy in terminating Harvey for abandoning her job.

I would find that Harvey was treated differently than Edwards. Edwards was employed for less than 1 year when she requested a leave of absence from June 9 to August 28 for personal reasons. When Edwards returned to work, she requested to be place in PRN status, "which means that she would be called on as needed basis." The Respondent granted Edwards request.[4]

According to the judge, the two employees, who were not eligible to take a leave of absence, were treated similarly in that neither was permitted to return to a full-time position. I believe the judge has focused on the wrong event. Although both employees were ineligible for a leave of absence, only Harvey was discharged. Edwards was never terminated, counseled, reprimanded, warned, or otherwise disciplined for taking an unauthorized leave eight times longer than Harvey's absence.

The judge's answer to this seemingly blatant disparate treatment is that when Edwards returned, she "independently initiated a request to go on PRN status." But, in fact, this ignores the same critical event. Both employees took unauthorized leaves of absence. Harvey's relatively short absence had barely begun before she was

[1] In all other respects I agree with my colleagues' decision.

[2] All dates hereafter are in 1995.

[3] The employee handbook states that a leave of absence may be granted to full-time and part-time employees who have completed 1 year of service and who have worked a specified minimum number of hours.

[4] The record is silent as to what immediately preceded Edwards' return to work. My colleagues state that she "was not permitted to return" to her former full-time job, which they assert is tantamount to termination. Given the state of the record on this point, I could as easily assert that her return to employment makes it apparent the Respondent granted her leave of absence request. In any event, the one thing that is clear is the record does not support that Edwards was terminated.

discharged. Edwards was never terminated, despite a lengthy absence.

Further, I cannot agree with the judge that Harvey's situation is similar to other employees discharged for abandoning their jobs. Harvey announced in advance her desire to take leave, consulted with two managers about the request, did what the managers requested, and sought to return to work at all. In contrast, all other employees terminated for job abandonment left their jobs without warning and failed to return to work at all.[5] The employee whose circumstances most closely parallel Harvey's situation was Edwards, who was also ineligible for a leave of absence under the handbook. Yet, Harvey was discharged, while Edwards continued to be employed by Respondent.

In sum, I would find the General Counsel has established that the Respondent's animus against Harvey's support for the Union was a motivating factor in the decision to discharge her.[6] Contrary to the judge, I would find the Respondent has failed to show that it would have discharged Harvey absent her union activity. Rather, the record shows disparate treatment in the handling of Harvey's case compared with Edwards, and there is no evidence of any other similarly situated employee who received the same treatment as Harvey. Thus, I would find that the Respondent discharged Harvey in violation of Section 8(a)(3). See *Aratex Services,* 300 NLRB 115, 116 (1990) (employer failed to sustain its *Wright Line* burden in light of evidence of disparate treatment).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression that your union activities and sympathies have been discussed in management meetings and that you would not be called in to work because of your union activities, instruct you not to show your job evaluations to other employees or to discuss your wages with other employees, and threaten you that we only have one or two employees to get rid of to win the union election.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the United Food and Commercial Workers, Local Union 1996 or any other union.

WE WILL NOT not comment unfavorably in employee job evaluations because employees wear union buttons.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Herbert Green full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Herbert Green for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Herbert Green and will remove from Ida Minter's February 15, 1995 job evaluation any reference to the wearing of union buttons on her tops, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and the reference to the wearing of union buttons will not be used against them in any way.

DECCA LIMITED PARTNERSHIP D/B/A MANOR CARE OF DECATUR

Lisa Y. Henderson, Esq., for the General Counsel.
Clifford H. Nelson Jr,. Esq. and *Kathleen J. Van Detta, Esq.,* of Atlanta, Georgia, for the Respondent-Employer.
James D. Fagan Jr., Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me in Atlanta, Georgia, on November 3, 4, 5, and 6, 1997, pursuant to a second amended consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on July 15, 1997. In addition, on July 16, 1997, the Regional Director ordered consolidated certain issues arising from the representation election in Case 10–RC–

[5] My colleagues assert that Harvey's discharge is comparable to that of other employees who were terminated after they disappeared without a word and never returned. To the extent that they are relying on the grounds for discharge spelled out in the handbook's termination provisions, their argument is unavailing. In defining offenses warranting discharge, the handbook lists job abandonment. While this provision may have applied to the discharge of those employees who disappeared without a word and never returned, it is wholly inapplicable to Harvey's situation. Given her diligent efforts to preserve the employment relationship, her conduct cannot reasonably be labeled as job abandonment.

[6] *Wright Line,* 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

14525. The complaint, based upon an original charge in Case 10–CA–28546 filed on June 21, 1995,[1] and an amended charge filed on April 2, 1997, an original charge in Case 10–CA–28558 filed on June 26, and an amended charge filed on April 2, 1997, a charge in Case 10–CA–28601 filed on July 11, a charge in Case 10–CA–28505 filed on October 3, and a charge in Case 10–CA–28920 filed on November 28, by United Food and Commercial Workers, Local Union 1996 (the Charging Party or Union), alleges that Decca Limited Partnership d/b/a Manor Care of Decatur (the Respondent or Manor Care) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Union's petition in Case 10–RC–14525 was filed on June 21, 1994. Thereafter, pursuant to a Decision and Direction of Election, issued on August 16, 1994, an election by secret ballot was conducted on September 15, 1994, among the employees in the appropriate unit to determine the question concerning representation.[2] Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 86 eligible voters, 35 cast valid votes for and 40 cast votes against the Petitioner. There were no void ballots, and there were 7 challenged ballots. The challenged ballots were sufficient in number to affect the results of the election. On September 22, 1994, the Petitioner-Union filed timely objections to the election.

Pursuant to a Decision and Direction of Second Election issued by the Board on July 14, a second election by secret ballot was conducted on August 18, among the employees in the appropriate unit. Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 64 eligible voters, 23 cast valid votes for and 34 cast valid votes against the Petitioner-Union. There were no void ballots, and there were 12 challenged ballots. The challenged ballots were sufficient in number to affect the results of the election. On August 24, Manor Care filed timely objections to the election and on August 25, the Petitioner-Union filed timely objections to the election.

Thereafter, as noted on July 16, 1997, the Regional Director concluded that the allegations for certain objections to the election in Case 10–RC–14525 parallel issues with the allegations in the complaint and ordered the consolidation of those cases for hearing before an administrative law judge. Before the opening of the hearing in this matter, the Petitioner-Union withdrew the underlying representation case and its August 25 objections to the election, which was approved by the Regional Director for Region 10 on November 4, 1997. Accordingly, the subject decision will only address the issues raised in the above noted unfair labor practice cases.

The Respondent filed an answer to the complaint on July 28, 1997, denying that it had committed any violations of the Act.

[1] All dates are in 1995 unless otherwise indicated.

[2] The appropriate unit is: All employees including housekeeping employees, dietary aides, cooks, nurses' aides, restorative aides, rehabilitation aides, laundry aides, the nursing administrative assistant, secretary/receptionists, medical records/ancillary clerk, assistant bookkeeper employed by Manor Care at its Decatur, Georgia facility, but excluding all guards, all charge nurses, nursing aide team leaders, department heads, managers and other supervisors as defined in the Act.

Issues

The complaint alleges that the Respondent discharged seven employees,[3] and engaged in independent violations of Section 8(a)(1) of the Act including creating the impression among its employees that their union activities were under surveillance, instructing employees not to show their job evaluations to other employees or to discuss wages, promising a wage increase to employees if they voted against the Union, threatening its employees with job loss if the Union was elected, implementing a more restrictive charting policy for certified nursing assistants (CNAs) and informing its employees that it would be futile for them to select the Union as their bargaining representative by telling employees that it would not bargain in good faith if the employees selected the Union as their bargaining representative.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in operating a long-term nursing care facility in Decatur, Georgia, where it annually purchased and received goods and materials at its facility in excess of $50,000 directly from points outside the State of Georgia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Manor Care is a 140-bed facility licensed by the State of Georgia to provide skilled and intermediate care to residents. Approximately 75 percent of its population are private pay residents who are cared for by 145-full- and part-time employees, 50 of whom are CNAs. The CNAs, who are principally involved in this case, assist the residents with personal grooming, bathing, feeding, and providing nourishment's during the course of the day.

After the first representation election was held on September 15, 1994, and the Petitioner-Union filed timely objections to the election on September 22, 1994, the Respondent and the Union continued their individual campaigns to convince employees about the pros and cons of union representation. During the period between the first and second election, the Union regularly engaged in handbilling in front of Manor Care and a number of employees wore union insignia and buttons on their uniforms while at work.

The principal supervisory hierarchy since January 1995, include Administrator Will Blackwell, Director of Nursing (DON) Jill Conley, Assistant Director of Nursing (ADON) Linda DeSue, and Licensed Practical Nurse Supervisor Carolyn

[3] The General Counsel withdrew par.17(e) of the complaint which alleges that the Respondent about July 7 suspended, discharged, and refused to reinstate its employees Diane Hines and Andril Seldon. Thus, the decision in this matter will not involve those employees.

[4] In regard to this last allegation, which is alleged in par. 8 of the complaint, the General Counsel withdrew it during the course of the hearing. Thus, it will not be addressed in the decision.

Aaron. Additionally, admitted agent David Jones, coordinated the first and second union organizational campaigns for Respondent.

B. The 8(a)(1) Violations

1. Allegations concerning Carolyn Aaron

The General Counsel alleges in paragraph 7 of the complaint that about February 15, Carolyn Aaron created the impression among its employees that their union activities were under surveillance and instructed employees not to show their job evaluations to other employees.

Employee Ida Minter was hired by Respondent on November 27, 1993, as a CNA. She actively supported the Union during the first and second organizational campaigns, frequently handbilled in front of Manor Care, wore union hats and numerous union buttons on her work uniform and openly contacted employees to support the Union and sign authorization cards.

In accordance with the employee handbook (R. Exh. 21), an employees performance will be evaluated 90 days after hire and annually thereafter. Despite this requirement, Minter did not receive her first appraisal until February 15, covering the entire period of her employment (G.C. Exh. 2). While the overall rating for the appraisal was good, Aaron commented in the guest relations performance standard section that, "Minter needs to review the dress code, wears large buttons on her tops, socks instead of stockings and short pants." Minter became upset about the evaluation, primarily to the remarks in the quest relations section, and showed it to a number of other CNAs while in the breakroom. According to Minter, Aaron told her not to show her evaluation to other employees. Minter also asked Aaron why she got a poor evaluation. Aaron told Minter that it was due to her clothes and the wearing of numerous buttons on her uniform. On cross-examination, Aaron admitted that the comments about buttons in the appraisal were referring to the numerous union buttons that Minter wore on her work uniform.

Minter reviewed the performance appraisal on February 22, and in the employee comments section stated that this is unfair to me because Aaron does not like me and I do not care for her and she should not care what I wear on my clothes. I conclude that Aaron told Minter not to show her appraisal to other employees because of the employee comments contained therein and her belief that a performance appraisal is an assessment of one person's performance and should not be shared with others. Whatever her reason, Aaron's directive to Minter not to show her appraisal to other employees, nevertheless infringes on employee rights under Section 7 of the Act. See *Waco, Inc.,* 273 NLRB 746 (1984). Accordingly, I find that by telling Minter not to show her performance appraisal to other employees, Aaron violated Section 8(a)(1) of the Act. In regard to the surveillance allegations in paragraph 7 of the complaint, I find that Aaron's comments about Minter wearing union buttons on her clothing created the impression among employees that their Union activities were under surveillance, and therefore violates Section 8(a)(1) of the Act.

With respect to paragraph 15 of the complaint, the General Counsel alleges that on June 29, Respondent implemented a more restrictive charting policy for the CNAs which provides disciplinary action for employees who fail to chart in their designated area.

In a unit meeting held on April 7, 1994, Aaron told the CNAs in attendance that charting should not be done in the television room.[5] CNAs were specifically told that charting should be performed at the nurses' station desk as frequently as possible because the residents' call lights could only be observed from that location and it was necessary to have coverage to respond to residents needs. Unfortunately, this policy was not strictly enforced and a number of CNAs continued to do their charting in the television room. Although a number of CNAs defied the rule, no one was written up for charting in an improper location. In June 1995, a number of residents and some family members complained to DON Conley that the call lights were not being responded to in a timely manner. Accordingly, it was decided to convene a mandatory meeting on June 29, to discuss a number of pressing issues including the charting policy. Aaron convened the meeting and instructed the CNAs that effective immediately, half of them were to chart at the nurses' station if they were passing trays for lunch in that area, and half were to chart in the dining room if their assignment was proximate to that location. While several CNAs testified that after the June 29 meeting, they continued to chart in the television room without incurring discipline, that is not the issue raised in the complaint. Rather, the General Counsel alleges that on June 29, the Respondent implemented a more restrictive charting policy for CNAs because the employees engaged in union and concerted activities. Contrary to this position, I find that the implementation of the charting policy was a reaffirmation of the prior instructions given to the CNAs in April 1994, which were not strictly adhered to, and had nothing to do with union activities. The Respondent addressed a legitimate concern of having sufficient staff available to answer residents' call lights and implemented a nondiscriminatory policy responsive to those needs. Under these circumstances, it cannot be established that the charting policy was implemented for discriminatory reasons, and I recommend that paragraph 15 of the complaint be dismissed. Thus, I conclude that the Respondent did not violate either Section 8(a)(1) or (3) of the Act as alleged by the General Counsel regarding the charting policy.

2. Allegations concerning Will Blackwell

The General Counsel alleges in paragraph 9 of the complaint that in June 1995, Will Blackwell promised its employees that they would receive a pay increase if they voted against the Union.

Ida Minter testified that in June 1995, just before she went on PRN status,[6] Blackwell called her into his office with DON Conley present and offered her a raise to $7 an hour if she voted no for the Union. Both Blackwell and Conley testified that they did attend a meeting with Minter to determine whether she fully understood the ramifications of going on PRN status but did not offer her $7 an hour to vote no for the Union and

[5] CNAs must chart everyday on a data sheet to keep track of the residents current activities of daily living including grooming, bathing, and bathroom activities.

[6] Minter decided to give up her full-time status when a Manor Care resident requested that she care full time for her outside the facility. PRN refers to working at Manor Care on an as needed basis. Employees are placed on a list and can either call on a weekly basis to inquire if work is available or the Respondent will go through the list to determine if an individual is available to work when the need arises to cover for unavailable employees.

did not discuss the Union during the meeting. In this regard, they wanted to make sure that Minter understood that employees who transfer from full time to PRN status do not receive benefits such as health insurance or evening and shift differentials.

I do not credit Minter's testimony for the following reasons. First, regardless if Minter voted for or against the Union, the standard wage rate for PRN employees is $7 an hour and she would receive that rate of pay regardless of her union sympathies. Second, at the time of the June 1995 meeting in Blackwell's office, the Board had not yet issued its July 14, Decision and Direction of Second Election which scheduled the election for August 18. Thus, at the time of the June 1995 meeting, Blackwell had no knowledge of whether there would be a second election and certainly did not know the exact date. Therefore, I find that Blackwell did not offer Minter during the June 1995 meeting in his office, a raise to $7 an hour, if she voted no in the election.

Under these circumstances, I recommend that the allegations in paragraph 9 of the complaint be dismissed.

3. Allegations concerning Annie Boyd

The General Counsel alleges in paragraph 10 of the complaint that about June 22, Annie Boyd created the impression among Respondent's employees that their union activities were discussed in management meetings and that employees would not be called in to work because of their union activities and that Respondent only had one or two employees to get rid of before it would win the union election.

Ida Minter testified that on June 21, while in the dietary pantry near the break area, Supervisor Annie Boyd asked to speak to her in private. Boyd told Minter that she just attended a lunch at the Olive Garden restaurant with a number of the other department heads and some of the conversation included that they had just got rid of one head ringleader, Herbert Green, and the next one was Minter. Boyd also told Minter that DON Conley said during the lunch that Minter is going on PRN and she will never be called for work. Minter also testified that since she went on PRN status in June 1995, she has never been called to work at Manor Care.

Blackwell and Conley acknowledged that a department head lunch was held at the Olive Garden Restaurant on June 21, and that Boyd was present, but each of them denied that any discussion about the Union occurred and no one mentioned the name of Herbert Green or Ida Minter during the lunch. ADON DeSue testified that while she often attended department head lunches, she had no recollection of attending the June 21 Olive Garden lunch. While Blackwell testified that he was not in a position at the table to hear Conley's conversations, Conley denied that she ever made a statement that Minter is going on PRN and she will never call her for work.

Despite Blackwell and Conley's denials that any discussion about the Union or the names of individual employees were mentioned at the lunch, I am inclined to credit Minter's testimony. First, it is highly significant that the Respondent did not call Boyd as a witness to rebut Minter's testimony. Accordingly, Minter's testimony concerning what Boyd told her is unrebutted. It is noted that while Conley is no longer employed at Manor Care, she was subpoenaed by Respondent to testify at the hearing. Thus, I find it telling that Boyd, although no longer employed at Manor Care, was not called as a witness in this matter. Second, I find it suspect that DeSue has no recollection of attending the June 21 lunch, especially in light of Conley's testimony that she was present and sat next to her. In all other respects, I found DeSue to be a very forthright and credible witness but I believe that she did not want to testify about this particular matter because her testimony would have been adverse to the Respondent's interests. Third, I find it significant that the conversation with Boyd occurred around the same time that both Blackwell and Conley acknowledge that they had a meeting with Minter to discuss the ramifications about her going on PRN status and the Boyd conversation mentioned this matter. Lastly, it is noted that Herbert Green was suspended for excessive absenteeism on the same day that the lunch took place at the Olive Garden.

Considering the forgoing, and particularly noting that the Respondent did not call Boyd as a witness to rebut the conversation that she had with Minter, I find that the General Counsel has sustained the allegations alleged in paragraph 10 of the complaint. Accordingly, by discussing the union activities of employees at management meetings, creating the impression among its employees that they would not be called to work and threatening employees that it only had one or two employees to get rid of to win the election, I conclude that the Respondent violated Section 8(a)(1) of the Act. *Portsmouth Ambulance Service,* 323 NLRB 311 (1997).

4. Allegations concerning Jill Conley and John Deardorff

In paragraph 11 of the complaint, the General Counsel alleges that Jill Conley and John Deardorff created the impression among its employees that their union activities were under surveillance.

On June 30, Danielle Murray finished work around 3 p.m., and went to the basement to clock out. As she was walking up the stairs to the first floor to exit the facility and wait for her ride home, Murray observed administrator in training John Deardorff taking pictures with a camera while standing in front of the window along with several other Manor Care employees including Conley. Murray walked over to the window, looked out, and observed a number of employees handbilling including Herbert Green and Ida Minter.

The Respondent did not call Deardorff to testify in this matter nor did it have Conley testify about her presence while pictures were being taken of employees handbilling in front of the facility. Rather, the Respondent proffered the testimony of Blackwell who stated that he instructed Deardorff to take pictures of Minter handbilling because she injured her knee while lifting a resident and filed a workers compensation claim. Thus, the pictures were to be used to rebut Minter's claim.

I am suspect of this affirmative defense. In this regard, the record evidence establishes that Minter did not injure her knee until a week before the second election which places it in August 1995. Therefore, I reject Blackwell's testimony and credit Murray who testified that the pictures were taken in June 1995, and note that she was terminated by Respondent on July 8, making it impossible that she was at the facility in August 1995. Additionally, her testimony is unrebutted as Respondent did not present any witnesses who were present on the date that the pictures were taken.

Under these circumstances, I conclude that the Respondent did not present any credible evidence to establish the necessity for taking pictures of its employees while they were engaged in protected concerted activity. Therefore, I find that by taking pictures of employees handbilling outside the Manor Care facil-

ity, the Respondent violated Section 8(a)(1) of the Act. See *F. W. Woolworth Co.* 310 NLRB 1197 (1993).

5. Allegations concerning David Jones

The General Counsel alleges in paragraphs 12 and 13 of the complaint that David Jones about July 1 and August 15 created the impression that Respondent had discharged employees because they engaged in union activities, informed employees that Respondent intended to win the union election by any means necessary and threatened its employees with job loss if the Union was elected to represent the employees.

David Jones is presently the president of Labor Management Training Corporation and previously was assistant vice president of human relations for Manor Care from 1982 to 1985. In 1985, Jones resumed his ministry as a Baptist preacher and has worked part time as a consultant to Manor Care for labor relations matters. He has a rich background in labor relations, having previously served as a business agent and director of organizing for two national labor organizations and as an independent contractor for a labor relations law firm in addition to his labor relations duties while employed at Manor Care on a full-time basis. He estimated that he has been involved in excess of 640 Board election campaigns including the September 1994 and August 1995 campaigns at the Respondent. In this regard, he coordinated those campaigns and trained the supervisors on the rights of employees using Section 7 of the Act as a guide. Jones knew many of the employees at the Respondent, having visited the facility on a number of occasions over the years when dealing with union election campaigns lodged by other unions than the subject Charging Party.

Jones testified that he knew that Herbert Green, Melvin Strong, and Ida Minter supported the Union and they independently had a number of discussions about the pros and cons of the Union with each side trying to convince the other of the wisdom of their respective positions. Likewise, Jones knew Brenda Hemsley as a long-term employee of Manor Care who transferred to the Decatur facility from one of its Maryland nursing homes.

Ida Minter testified that on June 21, the day that Herbert Green was suspended, Jones approached her and employee Cecilia Toby while they were standing in the hall. Minter told Jones that they just fired Green and according to Minter, Jones said that we are going to do whatever is necessary to keep the Union out.

Jones testified that while he did not independently remember the June 21 conversation, if he said anything to Minter about keeping the Union out he would have said that we will do whatever is necessary under the guidelines of the Act to keep the Union out.

I am inclined to credit Jones testimony concerning this conversation. First, Jones has a long background in dealing with Board election campaigns and is well versed in what may or may not be said within the guidelines of the Act. Even if Jones made the statement testified to by Minter, which I doubt, it does not contravene the Act without the presence of any nexus or reference to Green's union activities. Rather, I am of the opinion that if Jones made such a statement he would have included as he testified "under the guidelines of the Act" when discussing a termination of one employee with another employee. Likewise, I am not troubled by Jones inability to remember the specific conversation as he testified that he had numerous conversations with Minter about the Union and the ongoing election campaign. Lastly, it is noted that the General Counsel did not call Toby to testify about the June 21 conversation.

For all of the above reasons, I find that the General Counsel did not establish the allegations in paragraph 12 of the complaint and recommend that it be dismissed.

In regard to paragraph 13 of the complaint, Melvin Strong testified that on August 15, he was asked to attend a meeting on the first floor of the resident's dining room by ADON DeSue.

He arrived at the meeting around 2:30 p.m., and listened along with six other employees to Jones talk about the disadvantages of the Union and the obligation to pay union dues. During the meeting Strong asked Jones, "[W]hether after the election, as for a Union, or not having a Union, will I still have a job after August the 15th?" Strong testified that Jones did not respond to his question. Strong then asked Jones if he could be excused because although Manor Care was probably paying him to hear this rhetoric, they also hired him to take care of their residents. Since it was a voluntary meeting, Jones told Strong he could leave. While Strong was standing in the corridor, that separated the meeting space from the rest of the dining room, he heard Supervisor Jean Flesch state, go ahead and let him go, he is going to vote for the Union anyway.

Brenda Hemsley testified that just before the election, Jones told her that she had nine years in the Company, and Hemsley told him that she did not have anything to lose. The General Counsel asked Hemsley whether Jones mentioned the Union during their discussion, and Hemsley replied, that Jones did not use the word "Union." Jones recalls a conversation with Hemsley one morning in the lunchroom when a number of employees got on him because he had bought lunch for the night-shift employees and had not volunteered to buy lunch for the day shift employees. Jones asked Hemsley, how long have you known me, and she responded about 9 years. Jones replied, then you know my motto is I never volunteer, but I never refuse. Since the day-shift employees then asked him to buy lunch, he went ahead and purchased lunch for those employees.

Considering the testimony of Strong, it cannot be established that the Act has been violated. Strong admitted that Jones did not respond to his question and there is no evidence that Jones even heard what Strong asked. Indeed, Jones credibly testified that he is hard of hearing. Standing alone, the question is just that and in the absence of a response or some type of threat made by Jones, the Act cannot be violated. Thus, I recommend that this aspect of paragraph 13 of the complaint be dismissed. Likewise, I do not find the statement that Hemsley imputed to Jones to be violative of the Act. In the absence of any linkage to Hemsley's union activities, the statement cannot be considered to be a threat of job loss if the Union was elected to represent the employees. Moreover, I tend to credit Jones version of the conversation and how the issue of Hemsley's length of employment with Manor Care arose. I also note that on the eve of the August 1995 election, it would have been impossible for Jones to have threatened Hemsley with the loss of her job especially since she was previously terminated on March 30. Accordingly, based on the forgoing, I recommend that this aspect of paragraph 13 of the complaint also be dismissed.

6. Allegations concerning Margaret Williams

The General Counsel alleges in paragraph 14 of the complaint that about August 20, Margaret Williams instructed employees to cease discussing their wages with other employees.

Rose Harvey testified that around August 20, a number of coworkers were discussing the topic of wages in the downstairs lunchroom. Later that day, Harvey was approached by Human Resources Manager Margaret Williams who wanted to see Harvey in her office. Harvey told Williams that after she finished with a patient, she would go to her office. Harvey went to the office and in a one on one conversation, Williams told Harvey that several employees told her that Harvey was complaining about wages and she did not want Harvey to complain about wages because she was trying to hire new people and did not want those individuals to hear Harvey speak about wages. Harvey asked Williams why she picked her to talk about this issue, since there were a bunch of people that were discussing salary. Williams did not respond.

The Respondent did not proffer Williams as a witness at the hearing. Accordingly, the statements attributed to Williams are unrebutted. Under these circumstances, I find that Williams promulgation or statement that employees should not complain about or discuss wages among themselves to be unlawful, since it interferes with employees Section 7 rights. Therefore, I find that such prohibition violates Section 8(a)(1) of the Act. See *Hilton's Environmental, Inc.,* 320 NLRB 437 (1995).

C. The 8(a)(1) and (3) Violations

1. The job evaluation of Ida Minter

The General Counsel alleges in paragraph 17(a) of the complaint that the Respondent issued a poor job evaluation to its employee Ida Minter.

Minter was hired by Respondent on November 27, 1993, as a CNA. She actively supported the Union during the first and second organizational campaigns, testified in the 1994 Representation Case Objections Hearing, frequently handbilled in front of Manor Care, wore union hats and numerous union buttons on her work uniform and openly contacted employees to support the Union and sign authorization cards. Indeed, the Respondent does not dispute that Minter was a known supporter of the Union.

In accordance with the employee handbook (R. Exh. 21), an employees performance will be evaluated 90 days after hire and annually thereafter. Despite this requirement, Minter did not receive her first appraisal until February 15, covering the entire period of her employment (G.C. Exh. 2). While the overall rating for the appraisal, that was prepared by Supervisor Aaron was good, Aaron commented in the guest relations performance standard section that, "Minter needs to review the dress code, wears large buttons on her tops, socks instead of stockings and short pants." Minter became upset about the evaluation, primarily to the remarks in the guest relations section, and showed it to a number of other CNAs while in the breakroom. According to Minter, Aaron told her not to show her evaluation to other employees. Minter also asked Aaron why she got a poor evaluation. Aaron told Minter that it was due to her clothes and the wearing of numerous buttons on her uniform. On cross-examination, Aaron admitted that the comments about buttons in the appraisal were referring to the numerous union buttons that Minter wore on her work uniform.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion consideration by including the comments about Minter wearing "large buttons on her tops." First, Aaron admitted on cross-examination that the reference to large buttons on Minter's tops referred to her wearing union buttons. Second, there was no dispute that Minter was a vocal union advocate and David Jones admitted that he had numerous conversations with Minter to discuss the pros and cons of union representation at the Respondent.

The burden shifts to the Respondent to establish that the same action would have been taken place in the absence of the employee's protected conduct.

Respondent argues that because the overall rating of the job evaluation was good, it cannot be established that Minter's union activities impacted the rating in a negative way and, therefore the Act was not violated. In my opinion, this argument misses the point as Aaron admitted that the comments in the appraisal about Minter wearing large buttons on her tops referred to "union buttons." The right to wear union buttons or insignia while working as a form of expression is protected under Section 7 of the Act. An employer may, however limit or ban wearing of union insignia at work if *special circumstances* exist. Here, the Respondent made no arguments that the wearing of union buttons affected residents or their families, employee discipline, or the provision of services. See *Inland Counties Legal Services,* 317 NLRB 941 (1995). I further note that Minter wore at least five or six union buttons on her work uniform during the 1994 election campaign and no adverse consequences were visited upon her. Likewise, prior to the receipt of the February 15 appraisal, no one at Respondent ever criticized Minter about her clothes or dress appearance.

For all of the above reasons, and particularly noting that Aaron admitted the comments in Minter's job evaluation referred to the wearing of union buttons, I find that the Respondent has failed to demonstrate that it would have taken the same action against Minter even in the absence of her engaging in union activities.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act.

2. The termination of Brenda Hemsley

a. The merits

Brenda Hemsley was an employee for approximately 9 years having transferred to the Respondent in 1994 from another Manor Care facility located in Maryland. She was an active supporter of the Union, participated in handbilling in front of the facility and wore a union button on her work uniform.

There is no dispute that the Respondent knew of Hemsley's support for the Union.

Hemsley regularly took care of a resident named Mrs. Ferris. She was a difficult patient and demanded more attention then the normal resident, often requiring 35 to 45 minutes to take care of. Hemsley was not the only CNA to have difficulty with this patient and because of complaints expressed by Mrs. Ferris, three other CNAs were no longer assigned to her care. In order to reduce the stress level associated with the care of Mrs. Ferris, Respondent instituted a schedule so that the CNAs now assigned to Mrs. Ferris would not have to work with her two days in a row. On March 29, Hemsley reviewed the work schedule and observed that she was assigned to Mrs. Ferris 2 days in a row. She initially complained about the assignment to her First-Line Supervisor Carolyn Aaron and not satisfied elevated her concerns to ADON Linda DeSue.[7] After the meeting, DeSue promised to raise the issue with Administrator Will Blackwell.

Later that morning, Hemsley saw Blackwell in the hallway near the second-floor nurses' station. He was escorting his superior, Regional Vice President Jeff Grillo, and several other individuals on a tour of the facility. Hemsley, in the presence of the above individuals and several other residents and family members, asked Blackwell in a loud and emotional voice if DeSue had talked to him. Blackwell responded that he had not spoken to DeSue that morning. Hemsley said, she lied to me because she promised to talk to you. Blackwell said, I cannot talk to you now and requested that a meeting be convened later in the day at a different location. Hemsley said, I need to talk to you now and Blackwell said, not now. Hemsley then proceeded, in front of the above individuals numbering about 10, to tell Blackwell about her assignment to care for Mrs. Ferris 2 days in a row and how difficult it was to care for her. Hemsley stated, that Mrs. Ferris was demanding and it was impossible to please her, that she was the most difficult patient to care for and made it difficult to tend to the needs of the other residents, that we are catering to Mrs. Ferris and we should not do that, that we should not encourage her to stay in her room, that we should take Mrs. Ferris to the bathroom and not let her go in her diaper and she should not continue to receive special treatment including two pillows under her legs, constant changing of the air-conditioning and reheating her coffee. Blackwell told Hemsley that he would discuss the issue later and left the nurses' station to complete the tour.

Blackwell testified that due to the complaints of other CNAs about Mrs. Ferris, he was aware that she was a difficult patient and prior to March 29, discussed with Mrs. Ferris how demanding she was of the CNAs and if she needed extra care, she should consider arranging for a private sitter. Blackwell strongly objected to Hemsley's outburst including the breach of the patients confidentiality, the State of Georgia Statute of Residents Rights and the fact that family members and other individuals including residents overheard the conversation. After discussing the matter with his boss, Blackwell decided to take disciplinary action and prepared on March 29, the same day of the incident, the employee disciplinary record (R. Exh. 9). The disciplinary record states that Hemsley should have discussed the issue in private and should have known better then to publicly attack the administrator in front of guests and families. The conduct was detrimental to company operations that results in negative public relations and customer service. The offense committed is listed in the employee handbook as critical and is classified as a dischargeable offense (R. Exh. 21, p. 36).

On March 30, Blackwell and DON Conley met with Hemsley to inform her of his decision to terminate her. Hemsley, unbeknown to Blackwell and Conley, brought a tape recorder to the meeting and taped the conversation (R. Exh. 19). Although Hemsley denied that Blackwell discussed Respondent's Exhibit 9 with her, the document indicates that Hemsley refused to sign it on March 30. Hemsley did acknowledge , however, that Blackwell told her during the March 30 meeting, that she was being discharged for being insubordinate in front of his colleagues.

In applying the guidelines of *Wright Line*, I find that the General Counsel established that Hemsley was a union supporter and the Respondent had knowledge of her activity. The burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct.

I conclude that the Respondent terminated Hemsley not because of her union activities but rather because of her outburst in front of guests, residents and family members. In this regard, the above noted conduct is classified as a critical offense in the employee handbook with a penalty of discharge. Although I am aware that Hemsley participated in handbilling and wore a union button on her work uniform, the record indicates that numerous other Manor Care employees also engaged in this conduct but were not discharged. Moreover, the Respondent established by record evidence, that other employees who engaged in similar critical offenses listed in the employee handbook, were also summarily terminated. Thus, it cannot be established that Hemsley was treated in a disparate manner.

Considering the forgoing, I do not find that the Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Hemsley on March 30, and recommend that paragraph 17(b) of the complaint be dismissed.

b. The motion to dismiss

The Respondent made several motions during the course of the hearing primarily based on the fact that the General Counsel did not disclose that it possessed the tape recording of the March 30 meeting until after Hemsley testified to its existence during cross-examination, and after the Respondent finished reviewing the Board affidavit provided by the General Counsel in preparation for its cross-examination of Hemsley.[8]

Respondent first moved to dismiss all of the allegations in the complaint based on the mishandling of evidence critical to an important aspect of the case. Since Respondent's counsel acknowledges that the thrust of the motion concerns the mishandling of the investigation solely dealing with the March 30 tape recording and only deals with one employee, I am not inclined to dismiss the entire case based on this incident.

[7] Hemsley, along with several other CNAs, previously complained on three or four separate occasions about the difficulty in caring for Mrs. Ferris to Aaron and DeSue.

[8] Sec. 10394.7 of the Board's Unfair Labor Practice Casehandling Manual states in pertinent part: that the General Counsel must produce a statement of a witness he/she has called, where such a statement is in his/her possession in order that respondent's counsel may use the statement for purposes of cross-examination. The rule is patterned after the Jencks' Act, 18 U.S.C. § 3500

In regard to the second portion of Respondent's motion to dismiss the allegations of the complaint dealing with Hemsley, that matter is moot in light of my recommendation to dismiss that aspect of the case. Likewise, in light of this ruling, it is not necessary to strike the testimony of Hemsley.

Respondent has also requested that I conduct further proceedings to determine how the tape recording came to be in its present condition. In this regard, Hemsley testified that after she left the March 30 meeting she did not listen to the tape recording nor did she listen to it at any subsequent time but did provide it to the Board agent investigating the case when she gave her affidavit on July 21. Somehow, the tape recording which was played during the course of the hearing and is part of the record, contains missing portions of the initial part of the March 30 meeting and also contains a portion of a telephone conversation that the investigating Board agent had with an employer unrelated to the subject case. While it is unfortunate that this occurred, I am not inclined to order further proceedings to determine how the tape came to be in its present condition. This is an administrative matter which should be pursued with the Office of the General Counsel or Region 10. Further, in light of my recommendation to dismiss the portions of the complaint involving Hemsley, the motion to dismiss appears to be moot.

Contrary to the Respondent's portion of the motion to award attorney's fees for the defense of these cases due to the flagrant and improper conduct of the General Counsel, I am not inclined to grant such a request. In this regard, the General Counsel's case was professionally presented, involves numerous credibility resolutions and a number of the complaint allegations were found to be meritorious.

While not dispositive of this case, the Respondent objected to the General Counsel's failure to turn over the tape recording at the completion of Hemsley's direct examination at the same time that the General Counsel provided her affidavit in preparation for cross-examination. I am of the opinion that the Jencks' Act does not encompass such a requirement. Reference to 18 U.S.C. § 3500(e) states in pertinent part: that the term "statement," as used in relation to any witness called by the United States means:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, by said witness to a grand jury.

In light of the above, I conclude that the tape recording of the March 30 meeting does not fall within the meaning of the term "statement" under the Jencks' Act and, therefore, did not have to be turned over to Respondent at the completion of Hemsley's direct examination when her affidavit was provided to counsel in preparation for cross-examination. See *Delta Mechanical Inc.,* 323 NLRB 76 (1997) (contemporaneous statements captured on a tape recording at a substantive event are not *Jencks* statements because they are not descriptions of past events). Moreover, I note that the March 30 tape recording involves the Respondent's final action to terminate Hemsley, the actual decision to do so and the reasons therefor, having been memorialized on March 29. Thus, the tape recording of the March 30 meeting is not dispositive in resolving the issue of Hemsley's termination.

3. The termination of Herbert Green

The General Counsel alleges in paragraph 17(c) of the complaint that about June 21, the Respondent suspended and thereafter discharged its employee Herbert Green.

Green was hired as a CNA in September 1993, and was subsequently promoted to the position of nursing administrative assistant. During the hiring process, Green apprised Respondent that he suffered from hypertension and provided his Veterans Administration Disability Certificate to substantiate those assertions. Throughout his tenure, he found it necessary several times a month to leave work during the workday, because of elevated blood pressure. Respondent was aware of this situation, often taking his blood pressure, and directing Green to leave work until his blood pressure returned to safer levels.

Green was the leading union organizer and assumed the unofficial title of head of the organizing committee. Respondent knew of his active leadership role in the Union, frequently observed his handbilling activities and often discussed with Green the pros and cons of electing the Union at Respondent.

The employee handbook provides that two absences within 30 days constitutes unsatisfactory attendance and is classified as a minor offense. The first accumulation of two absences within 30 days warrants an oral warning while a second infraction subjects an employee to a written warning and the third offense results in discharge. Linda DeSue credibly testified that the 30 days are calculated on a rolling basis and all unexcused absences are included. For example, even if an employee calls in sick and provides a doctors excuse, that is counted as an unexcused absence.

On February 8, an ice storm took place in the Atlanta area and Green was unable to get to work because the bus he normally took could not navigate his rural neighborhood. Since the majority of employees did come to work despite the inclement weather, Green was assessed an absence for missing work that day. On March 1, Green called in sick due to his hypertension and on March 2, was given a written warning for accumulating two absences in a 30-day period. Green was again absent on June 5 and 15, due to hypertension, and when he returned to work was told by Jill Conley and DeSue on June 21, that he was suspended for 3 days pending an investigation, because of having accumulated a second infraction of two absences in a 30-day period (R. Exh. 11).

On June 26, while still on suspension, Conley telephoned Green at home and asked him to come to the facility to go over his termination paperwork. Immediately after informing her that he could not come to the facility due to a scheduled doctors appointment, Green telephoned Blackwell who told him that he was being terminated for excessive absenteeism. On June 26, the Respondent prepared the termination disciplinary record noting that Green was being discharged for excessive absenteeism and that he refused to sign the employee record (R. Exh. 12).

Under *Wright Line,* I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in suspending and terminating Green. First, the evidence establishes that the Respondent was aware of Green's leadership role in organizing the employees and serving as spokesperson for the employees on behalf of the

Union. Second, I find that Annie Boyd told Ida Minter that the Respondent got rid of one head ringleader and that was Herbert Green.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

In regard to the Respondent's reason for Green's termination, I note that while the disciplinary record of June 26 reflects that he incurred a written work performance warning on July 25, 1994, the sole reason enunciated for the termination was because of Green's excessive absenteeism. This is confirmed by DeSue's testimony that Blackwell told her to terminate Green for excessive absenteeism because he incurred two separate infractions for absences in a 30-day period. Moreover, by notice dated June 21, to the State of Georgia, the Respondent noted that the reason for separation was for "excessive absenteeism" (C.P. Exh. 1).

In comparing other employee records for discharges due to excessive absenteeism, I find that Green was not treated in a similar fashion to employees that did not engage in protected activities. It is noted that unsatisfactory attendance (two absences within 30 days) is classified as a minor offense in the employee handbook. The first offense warrants an oral warning while the second offense is subject to a written warning and a third offense results in discharge. This was the progression that employees Beverly Stephens, Brenda Mayo, and Janie Strozier (R. Exhs. 25, 29, and 33), were afforded before termination took place after the third offense. Green, however, only incurred two separate infractions for excessive absenteeism during a 30-day period, yet he was terminated immediately after the second offense. Significantly, the separation notice to the State of Georgia, contradicts the June 26 employee termination record and shows that the Respondent actually terminated Green on June 21, the same day that he was suspended pending investigation of the absences. Lastly, I find that the Respondent included the July 1994 work performance infraction in the June 26 disciplinary record, to buttress its position that Green was terminated in accordance with its three offense progressive discipline policy. This attempt does not withstand scrutiny as the Respondent testified and provided records to the State of Georgia that Green was terminated solely for excessive absenteeism. As the evidence shows, Green only incurred two separate infractions of excessive absenteeism and should not have been terminated on that basis. I conclude that the Respondent hastily went forward with its predesigned plan to terminate Green, did not intend to make any meaningful investigation of his absences during the 72-hour period, and did not follow its preexisting progressive discipline plan when terminating Green. The evidence of disparate treatment together with the unrebutted testimony of what Boyd told Minter leads me to conclude that the real reason for Green's termination was due to his aggressive role as the leading union adherent at the Respondent. Moreover, I fully credit Green's rebuttal testimony that in 1993 and 1994, he regularly incurred more than two absences in a 30-day period due to his hypertension, but was never given either an oral or written reprimand for these unauthorized absences. Rather, it was only after the union campaign started to accelerate in March 1995, that he was written up for unauthorized absences. While the Respondent argues that the management team of Blackwell, Conley, and DeSue was not employed at the facility in 1993 and 1994, having started in January 1995, it is noted that the same employee handbook, containing the provisions for excessive absenteeism, was in effect for the years of 1993, 1994, and 1995.

Accordingly, I find that the Respondent has failed to demonstrate that it would have taken the same action against Green even in the absence of his engaging in union activities, and conclude that his suspension and termination violated Section 8(a)(1) and (3) of the Act.

4. The termination of Danielle Murray

The General Counsel alleges in paragraph 17(d) of the complaint that about July 7, the Respondent discharged its employee Danielle Murray.

Murray was hired as a CNA in August 1994, but did not vote in the September 1994 election because her date of hire was after the eligibility period. Nevertheless, she handbilled in front of the facility and wore a union button on her work uniform prior to the election. Likewise, before her termination, she was active in the organizing campaign for the second election and continued to wear a union button on her work uniform.

On June 19, Murray attended a meeting wherein Supervisor Carolyn Aaron told the CNAs that it would be necessary for them to take over additional duties. These duties included making their own assignment sheets, bringing diapers upstairs, and performing the former team leaders' responsibilities. Murray told Aaron that this was not fair and that team leaders were paid extra for completing special assignments. Aaron also informed the CNAs that because they continued to perform their charting in the television room, contrary to outstanding instructions, they must now chart at the nurses' station. After the meeting, Murray saw Conley and DeSue in the hallway and asked that a meeting be scheduled to discuss the team leaders' responsibilities. The meeting was held later that day and a number of issues including taking over the team leaders' responsibilities and charting were discussed. Murray told Conley and DeSue that Aaron wanted all the CNAs to chart at the nurses' station. DeSue told the CNAs that they could also chart in the dinning room but the television room was off limits because it was for residents and family members.

On June 29, Aaron convened a meeting of the CNAs and addressed a number of issues from a prepared agenda (R. Exh. 5). In particular, Aaron told the CNAs that when they pass food trays in the halls, they should chart at the nurses' desk and when they pass trays in the dining room, they should chart in that location. Although Murray denies that she made several derogatory statements regarding the instructions, I find that she told Aaron during the course of the meeting that the rule was stupid, that their was no way she was going to chart at the desk and she was not going to do it, "shit."[9] Aaron told Murray that she would be written up for not following orders. Murray replied, that she did not care and she was going to do what she wanted to do. Aaron credibly testified and the assignment sheet for June 29 confirms, that Murray was scheduled to pass trays in the hall, and therefore, her charting was to be done at the nurses' desk. At the end of the workday, Aaron checked the charting records and determined that Murray did her charting in the dinning room rather then in her assigned location at the nurses' station. Accordingly, Aaron consulted with Conley and DeSue, and it was decided to terminate Murray for the critical offense of insubordination and the willful failure to carry out

[9] I fully credit the testimony of employee Beverly Spencer to this effect and also note the signed statement of employee Veronique Edmunds (R. Exh. 24) of what Murray said during the June 29 meeting.

orders. The employee disciplinary record was immediately prepared on June 29, but was not presented to or discussed with Murray until she returned to work from approved leave on July 8.

The General Counsel takes the position that Murray's discharge was undertaken due to her engaging in union activities or because of her protected concerted activities and statements made to Aaron during the June 29 meeting. I fully agree with the Board's holding in *Mike Yurosek & Sons, Inc.,* 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case I find that Murray's complaints, about the new rule that half of the CNAs should chart at the nurses station and the other half in the dinning room, fall within protected concerted activity. Moreover, I find that Murray's use of the words "stupid rule" and "shit" when describing the new charting rules is not outrageous conduct which would render Murray unfit for employment if that was the sole reason for her discharge. In this regard, and in accordance with the principles of *Wright Line,* I do not find that Murray was terminated either because of her union activities or for engaging in protected concerted activity during the course of the June 29 meeting. Rather, I find that the Respondent would have taken the same action even in the absence of Murray's protected conduct. The evidence reveals that Murray's June 29 work assignment was to pass trays in the hall, and correspondingly, her charting was to be undertaken at the nurses' station. Indeed, Murray told Aaron during the meeting that she was not going to chart at the nurses' station, that she was going to do what she wanted to do, and to write her up because she did not care. I find that the termination was based on Murray's direct refusal to follow the June 29 work assignment and her failure to complete the charting at the nurses' station, rather then for her protected complaints about the rule or her use of ill advised language during the course of the meeting. As the Respondent has consistently done with other employees for violating the critical offense of Insubordination, Murray was terminated for her willful failure to carry out orders (R. Exh. 40). In regard to Murray's union activities, I note that numerous other employees handbilled, wore union buttons on their work uniforms and that the Respondent was aware of those activities, yet they were not disciplined or discharged. Here, I find that the Respondent affirmatively supported its reason for Murray's termination and also note that it took place during her probationary year.

Accordingly, based on the forgoing, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it terminated Danielle Murray on July 8, and recommend that paragraph 17(d) of the complaint be dismissed.

5. The termination of Melvin Strong

The General Counsel alleges in paragraph 17(f) of the complaint that about September 15, the Respondent suspended and thereafter discharged its employee Melvin Strong.

Melvin Strong was hired at Manor Care in September 1991, as a CNA. He was active in the September 1994 and August 1995 union campaigns, frequently handbilled in front of the Manor Care facility and testified in the Representation Case hearing. There is no dispute that the Respondent was aware of Strong's active involvement and support for the Union.

On September 9, Sharon Foote the daughter of resident Mrs. Foote requested assistance of Manor Care personnel to assist in getting her mother into the family car in order to take her on an outing to the shopping mall. Mrs. Foote has Alzheimer's disease and it was necessary to obtain assistance when transporting her from the facility to the vehicle. Strong was designated to assist Mrs. Foote and approached Sharon Foote (Foote). Foote credibly testified that when she asked Strong for assistance in getting her mother to the family car, he was very rude and initially said that he did not have time to assist the resident in getting to the vehicle. Foote made an additional request for assistance and Strong complied placing Mrs. Foote in a wheelchair and wheeling her to the car. Foote requested that her Mother be placed in the back seat, informing Strong that they always placed her in the back, because it was easier to keep an eye on her and as a means of not interfering with the driver. Additionally, due to a hip operation, it was easier to put Mrs. Foote in the back seat and swivel her over. Strong refused to put Mrs. Foote in the back seat and said he would only place Mrs. Foote in the front seat because it was safer. He also took off Mrs. Foote's sun glasses when he put her in the front seat. Foote told Strong that no one has done that before. Strong replied, that you are used to getting things done your own way. Foote replied, that she was used to getting proper cafe for her Mother.

Foote testified that she was so upset about what happened that she immediately called Blackwell at home on Saturday and related the above facts to him.[10] She requested that Strong not be assigned to care for her Mother during her stay at Manor Care. Blackwell informed Conley of his conversation with Foote and alerted her that Foote would discuss the matter with her when visiting her Mother at the facility on Monday. Foote met with Conley on Monday and Conley memorialized their conversation and the facts surrounding the incident (R. Exh. 20).

The meeting with Foote was the first step in Respondent's internal investigation process whenever allegations of abusive treatment are raised against an employee by the family of a resident. DeSue credibly testified that on September 13, around 2:50 p.m., she approached Strong at the timeclock and requested that he come to a meeting in Conley's office. Strong refused and left for the day. Conley, on September 13, prepared and sent a letter to Strong enclosing the employee disciplinary record that shows that he refused to meet with her and informed him that he was being suspended for 3 days pending the final investigation of the patient care matter (R. Exh. 3). After the completion of the investigation and Strong's 3-day suspension on September 19, it was determined to terminate him for conduct detrimental to company operations that results in negative public relations and patient care (R. Exh. 23).

In addressing the termination under the guidelines of *Wright Line,* I find that the Respondent was aware of Strong's active involvement in the Union and his efforts in trying to organize Manor Care employees.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct. I find that while Strong denied that he engaged in any inappropriate behavior or used rude language in dealing with Foote, the overwhelming evidence is to the contrary. Thus, I fully credit the testimony of Foote,

[10] Before Mrs. Foote became a resident at Respondent, she was a patient at Manor Care of Marietta for 3 years. In all that time, Foote never had an occasion to call any Manor Care official at home.

Blackwell, Conley, and DeSue involving Strong's treatment of Mrs. Foote and conclude that the Respondent terminated him for legitimate and nondiscriminatory reasons. Moreover, I note that Strong initially denied that he was previously counseled about patient care and customer relations but grudgingly admitted same when confronted with his 1994 performance appraisal on cross-examination. Additionally, I do not credit Strong's testimony that neither Conley nor DeSue requested to meet with him to inquire about his version of the facts concerning the incident with Mrs. Foote. Rather, I find DeSue's testimony regarding this matter and Conley's letter dated September 13, to be determinative of this issue. In regard to Strong's union activities, he admitted that numerous other employees handbilled, wore union insignia and supported the Union but they were not disciplined or terminated. Lastly, I find that the Respondent treated other similarly situated employees in the same manner and terminated individuals who engaged in conduct detrimental to customer relations and patient care (R. Exhs. 41, 42, and 43).

For all of the above reasons, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it suspended and terminated Melvin Strong and recommend that paragraph 17(f) of the complaint be dismissed.

6. The termination of Rose Harvey

The General Counsel alleges in paragraph 17(g) of the complaint that about November 11, the Respondent discharged its employee Rose Harvey.

Rose Harvey was hired at Respondent in May 1995, as a CNA. Harvey was an active supporter of the Union, handbilled in front of the Manor Care facility, and served as the Union's observer during the August 1995 election and ballot count along with Respondent officials Blackwell, Jones, Conley, and DeSue. Thus, there is no dispute that the Respondent was aware of her conduct on behalf of the Union.

On November 10, Harvey informed Conley that her grandmother passed away, and that she would let her know what the arrangements were as soon as she found out. Harvey further apprised Conley that she would have to go out of town as the funeral was scheduled in New York. Conley requested that Harvey let her know the arrangements as soon as she became aware of them (G.C. Exh. 9). On November 11 (Saturday), Harvey became aware of the funeral arrangements and attempted to contact Conley at work. Since Conley was not scheduled to work that day and ADON DeSue was on call, Harvey asked that she be paged. DeSue testified that around 9:30 a.m. on November 11, she was paged and informed that Harvey wanted to speak with her. Harvey told DeSue that her grandmother had died and she needed to go to New York for the funeral. DeSue instructed Harvey to put the request in writing and include when she was leaving and when she would return to work. During the conversation, DeSue told Harvey that her job would not be guaranteed because she was taking an unauthorized leave of absence. Harvey informed DeSue that she spoke with Conley the preceding day but did not fill out any "LOA paperwork" because she did not know when the funeral was scheduled. Harvey also told DeSue that she would not be able to work the Sunday day shift because she would be in New York. Immediately after the telephone conversation with DeSue, Harvey prepared on November 11, a written request for a leave of absence due to the death of her grandmother. She requested that it start on November 12 and end on November 20, with her return to work on November 21. Harvey went to the facility that day and placed the request under DeSue's office door.

On November 14, Conley and DeSue reviewed Harvey's request for a leave of absence and determined that because she had been employed for less then 1 year, she was ineligible to take a leave of absence.[11] Additionally, they noted that the employee handbook provides for 1 day of paid leave if you are scheduled to work on the day of the funeral of a grandparent. Conley and DeSue reviewed the work schedule and observed that Harvey was scheduled to work on November 11 and 12. Since Harvey was entitled to only 1 day of paid leave to attend the funeral of a grandparent and was not eligible to be considered for a leave of absence, the fact that she did not return to work on November 12 or thereafter, warranted termination based on job abandonment under the critical offense policy in the employee handbook. Accordingly, Conley prepared the necessary paperwork on November 14, to effectuate Harvey's termination (G.C. Exh. 8).

The General Counsel takes the position that Harvey was terminated because of her union activities and was not treated in the same manner as a similarly situated employee who did not engage in protected conduct. The Respondent opines that Harvey was terminated based on job abandonment and was treated in the same manner as a similarly situated employee.

Harvey returned to the Atlanta area and found her termination notice in the mail. She also observed an ad in the Sunday Atlanta newspaper that the Respondent was looking to hire CNAs on the same shift that she previously worked. Harvey telephoned Human Relations Manager Margaret Williams about the newspaper ad but Williams declined to discuss the issue with her.

Under the guidelines of *Wright Line,* I find that the General Counsel has established that the Respondent was aware of Harvey's union activities and protected conduct. I find, however, that the Respondent would have taken the same action in terminating Harvey even in the absence of her protected conduct. In this regard, the Respondent's policy concerning eligibility for a leave of absence applies to all full-time and part-time employees regardless of whether they supported the Union and provides that employees employed for less then a year are not eligible to take leave of absences. Moreover, Harvey admitted that the handbook provides and DeSue informed her on November 11, that her job could not be guaranteed because she was taking an unauthorized leave of absence. In regard to the General Counsel's argument that fellow employee Sharon Edwards was treated differently then Harvey, the record evidence does not support such an assertion. Edwards, like Harvey, was employed for less then a year when she requested to take a leave of absence from June 9 to August 28, for personal reasons. Upon returning to the area, Edwards was not reinstated to her full-time CNA position. Rather Edwards, unlike Harvey, independently initiated a request to go on PRN status. Since employment in this status is on an as needed basis, the Respondent granted Edwards request. Under these circumstances, I find that Harvey and Edwards were treated the same, as both employees were not eligible to take leave of absences and nei-

[11] The employee handbook states in pertinent part: that LOAs may be granted to full-time and part-time employees who have completed one (1) year of service and who have worked at least 1250 hours during the preceding year. We cannot hold or guarantee your position if you take a LOA for personal or educational reasons.

ther employee was permitted to return to their full-time position. With respect to Harvey's union activities, I find that they did not differ substantially from other employees who supported the Union, attended the ballot count, engaged in handbilling or wore union insignia, yet those employees were not terminated because of such conduct. Lastly, I credit Conley's testimony that even if there was a newspaper ad recruiting CNAs about the time of Harvey's termination, employees who took an unauthorized leave of absence and abandoned their jobs were not eligible for full-time reemployment. Accordingly, I find that Harvey was not terminated because of her protected conduct nor was she treated in a disparate manner. Therefore, Respondent's determination to terminate Harvey on November 14, did not contravene the Act.

Considering the forgoing, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act and recommend that paragraph 17(g) of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by creating the impression among its employees that their union activities were under surveillance, by instructing employees not to show their job evaluations to other employees or to discuss their wages with other employees, and threatening employees that they only had one or two employees to get rid of to win the union election.

4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by suspending and discharging its employee Herbert Green and issuing a poor job evaluation to its employee Ida Minter.

5. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by discharging employees Brenda Hemsley, Danielle Murray, Diane Hines, Andril Seldon, Melvin Strong, and Rose Harvey.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged employee Herbert Green, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension/discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Decca Limited Partnership d/b/a Manor Care of Decatur, Decatur, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities were under surveillance.

(b) Instructing employees not to show their job evaluations to other employees.

(c) Instructing employees to cease discussing their wages with other employees.

(d) Threatening employees that they only had one or two employees to get rid of to win the union election.

(e) Discharging or otherwise discriminating against any employee for supporting United Food and Commercial Workers, Local Union 1996.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Herbert Green full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Herbert Green whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension/discharge and notify the employee in writing that this has been done and that the suspension/discharge will not be used against him in any way. Also, remove from its files any reference in Ida Minter's February 15, 1995 performance appraisal to the wearing of large buttons on her tops.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Decatur, Georgia, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility in-

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

volved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.